



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2016-0592; FRL-9975-13-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans;
Virginia; Amendment to Ambient Air Quality Standard for Ozone**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the Commonwealth of Virginia state implementation plan (SIP). This revision consists of an amendment to Virginia's SIP to incorporate by reference, the most recent federal ambient air quality standard for ozone. EPA is approving this revision in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2016-0592. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the person identified in the "For

Further Information Contact” section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Gavin Huang, (215) 814-2042, or by e-mail at huang.gavin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2015 (80 FR 65292), EPA revised the primary and secondary national ambient air quality standards (NAAQS) for ozone to 0.070 parts per million (ppm). The primary and secondary ambient air quality standards are met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.070 ppm.

On July 25, 2016, the Commonwealth of Virginia through the Virginia Department of Environmental Quality (VADEQ) submitted a formal revision to its SIP. The SIP revision seeks to incorporate the 2015 ozone NAAQS promulgated by EPA into the Virginia SIP.

On October 16, 2017 (82 FR 47985 and 82 FR 48035), EPA simultaneously published a notice of proposed rulemaking (NPR) and a direct final rule (DFR) for the Commonwealth of Virginia approving the SIP revision. EPA received adverse comments on the rulemaking and withdrew the DFR prior to the effective date of December 15, 2017. In this final rulemaking, EPA is responding to the comments submitted on the proposed revision to the Virginia SIP and is approving the revision to the Virginia SIP to incorporate by reference the 2015 ozone NAAQS.

II. Summary of SIP Revision and EPA Analysis

In the July 25, 2016 SIP submission, Virginia seeks to add regulation 9VAC5-30-57 “Ozone (8-

hour 0.070 ppm)” to the Virginia SIP. This regulation incorporates by reference the 2015 ozone NAAQS as promulgated by EPA and is consistent with the NAAQS set out in 40 CFR part 50. *See* 80 FR 65292 (October 26, 2015).

Virginia’s submittal seeks to add to the Virginia SIP Regulation 9VAC5-30-57 which incorporates by reference the 2015 ozone NAAQS, as promulgated by EPA. EPA finds the SIP submittal approvable pursuant to section 110 of the CAA.

EPA received public comments on the NPR that will be addressed in section III of this rulemaking.

III. Response to Comments

During the comment period, EPA received several anonymous comments on this rulemaking. EPA is responding to the comments submitted on the proposed revision to the Virginia SIP specific to this action. All other comments received were either supportive of or not specific to this action and thus are not addressed here.

Comment: A commenter stated that EPA should not add the 2015 ozone standard to any state’s SIP as the Administrator has publicly stated that he intends to repeal the ozone standard. The commenter believes that the Administrator’s announcement can be interpreted as a promulgation by the Agency, and EPA should not act until the review is completed. The commenter also stated that EPA must hold off on any ozone action until a court review is completed.

Response: EPA disagrees with the comment. Specifically, EPA disagrees that it has promulgated, or could promulgate, a change to the 2015 ozone NAAQS through any public announcement. If EPA were to decide to revisit and change the 2015 ozone NAAQS, the

existing standards would remain in place at least until EPA, through public notice and rulemaking, took final action to make any revisions. States may seek to incorporate existing NAAQS into their SIPs under CAA section 110. While judicial review may be pending relating to the 2015 ozone NAAQS, nothing prohibits a state from incorporating by reference the 2015 ozone NAAQS into its SIP.

IV. Final Action

EPA is approving the July 25, 2016 Virginia SIP revision submittal which seeks to add regulation 9VAC5-30-57 “Ozone (8-hour 0.070 ppm)” to the Virginia SIP pursuant to section 110 of the CAA. Regulation 9VAC5-30-57 incorporates by reference the 2015 ozone NAAQS which set the level of the 8-hour ozone standard at 0.070 ppm.

V. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to

documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General’s January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

VI. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Virginia 9VAC5-30-57 described in the amendment to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these materials generally available through <http://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.¹

VII. Statutory and Executive Order Reviews

¹ 62 FR 27968 (May 22, 1997).

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C.

804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action adding regulation 9VAC5-30-57 “Ozone (8-hour 0.070 ppm)” to the Virginia SIP may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone

Dated: February 23, 2018.

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV—Virginia

2. In § 52.2420, the table in paragraph (c) is amended by adding the entry “5-30-57” in numerical order under the heading “**9 VAC 5, Chapter 30 Ambient Air Quality Standards [Part III]**” to read as follows:

§ 52.2420 Identification of plan.

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(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
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9 VAC 5, Chapter 30 Ambient Air Quality Standards [Part III]				
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5-30-57	Ozone (8-hour, 0.070 ppm)	06/01/2016	[Insert date of publication in the Federal Register] [Insert Federal Register citation]	
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[FR Doc. 2018-04422 Filed: 3/9/2018 8:45 am; Publication Date: 3/12/2018]